SUPREME COURT, U. S.

133

No. [redacted]

FILED

MAY 27 1968

JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

GEORGE H. FULTZ,

Petitioner,

vs.

STATE OF OHIO.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BERNARD J. GILDAY, JR.

Attorney for Petitioner

1500 American Building

Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	10
Appendix A	11

CITATIONS

Beck v. Ohio, 379 U.S. 89	5, 8
Brinegar v. United States, 338 U.S. 160	6
Carroll v. United States, 267 U.S. 132	6
Carter v. United States, 317 Fed. 2d 386	6
Dixon v. Maxwell, 177 Ohio State 20	6
Draper v. United States, 358 U.S. 307	5
Staples v. United States, 320 Fed. 2d 817	6
State v. Rogers, 94 Ohio Law Abstract 110	6
State v. Stotts, 8 Ohio Appeals 2d 97	5
United States v. DiRe, 332 U.S. 581	9

STATUTES

Ohio Revised Code 2935.04	6
Ohio Revised Code 2935.03	7

CONSTITUTIONS

Amendment IV, United States Constitution	2
Amendment XIV, United States Constitution	3

In The

Supreme Court of the United States

October Term, 1967

No. ———

GEORGE H. FULTZ,

Petitioner,

vs.

STATE OF OHIO.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

George H. Fultz, through his retained counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio.

OPINIONS BELOW

George H. Fultz was convicted of carrying concealed weapon (Revised Code of Ohio, Section 2923.01) by the Court of Common Pleas, Hamilton County, Ohio, a jury having been waived, on December 19, 1966. No written opinion was rendered. The Court of Appeals for the First Appellate District of Ohio affirmed that conviction on May 8, 1967, with a per curiam finding no error prejudicial to the rights of petitioner. The opinion of the Supreme Court of the State of Ohio, which affirmed that conviction, was entered on February 28, 1968 and is reported at *13 Ohio State 2d 79*. (Appendix A, *infra*. pp. 12-15)

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 USC 1257(3) since the right of petitioner to be free from unreasonable search, unlawful seizure and arrest under Amendment IV to the Constitution of the United States and the right to due process of law under Amendment XIV to the Constitution of the United States were denied to him.

QUESTIONS PRESENTED

1. Does probable cause to believe that a felony has been or is being committed exist where the only information or knowledge held by the arresting officer consists of a "man-wanted" police-radio broadcast, the content of which message is not received in evidence.

2. When a police officer only has some hearsay information, in the form of a police-radio broadcast that an arrest warrant for a misdemeanor has been issued upon a citizen's affidavit, may such officer lawfully arrest, detain and search the person named in the arrest warrant and his vehicle without having actual, physical possession of such warrant, where such officer is not a member of the police unit to which the arrest warrant was directed and where the arrestee violates no law in the officer's presence.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are Amendments IV and XIV which read in material parts, as follows:

Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 30, 1966, at approximately 3:00 p.m., Ohio State Highway Patrolman Miller stopped the vehicle of Petitioner at the intersection of Loveland-Madeira Road and Branch Hill Road, Hamilton County, Ohio, and placed Petitioner under arrest. At this time, Patrolman Miller had no warrant for Petitioner's arrest and did not observe him violate any law of the State of Ohio. At approximately 2:35 p.m. on April 30, 1966 the Hamilton County Communications Center broadcast a report that *"a person with a shotgun"* was wanted by the Loveland, Ohio Police. Officer Miller heard this broadcast but had no other information, of any kind or type, concerning Petitioner. When asked, in trial, by the Prosecuting Attorney,

> "and why did you stop the car that Mr. Fultz was driving Officer?

Patrolman Miller replied,

> *"On the authority of a radio message."*

No description of Petitioner was given in this broadcast and the message itself was never received in evidence by the Trial Court, which fact was regretted by The Supreme Court of Ohio.

At approximately 12:45 p.m. on April 30, 1966, Police Chief Fritz, Loveland Police Department, answered a call at a Trailer Park in Loveland, Ohio, and proceeded to transport, in his police cruiser, from this Trailer Park, one Dolly Meece, to the Lockland, Ohio Police Station for the purposing of allowing Mrs. Meece to charge Petitioner with the crime of assault and battery, a misdemeanor.

Sometime between the hours of 1:50 p.m. and 2:45 p.m. o'clock, a warrant for the arrest of Petitioner for assault and battery was issued. Chief Fritz took possession of the same and drove to the location where Petitioner was in custody and detained by Patrolman Miller, arriving at such point at 3:20 p.m.

At about 3:07 p.m. Ohio State Highway Patrolman, Vernon Wright, who, also, had heard the aforementioned broadcast arrived at the intersection where Petitioner was being detained. At this time Petitioner was out of his vehicle and both her person and his automobile had been searched by Patrolman Miller. Officer Wright immediately proceeded to re-search Petitioner's vehicle and found, under the front seat, a 32 caliber revolver. Prior to and at the time of both searches neither Patrolman Miller nor Patrolman Wright knew that a warrant charging Petitioner with a misdemeanor had been issued.

At approximately 7:00 p.m. on April 30, 1966, Petitioner was charged by Officer Wright with the crime of carrying concealed weapon. At no time was Petitioner ever charged with or prosecuted for any violation of law for any act which allegedly occurred at the Milford Trailer Park, and/or for any act which gave rise to the Police radio broadcast.

The Grand Jury of Hamilton County, Ohio, on June 2, 1966, returned its indictment charging therein a violation of Section 2923.01 (Carrying Concealed Weapons) Revised Code of Ohio. Prior to arraignment, Petitioner filed his written motion to suppress evidence which motion was overruled by the Trial Court. Trial being had before the Court, a jury being waived, the Court overruled Petitioner's in-trial, oral motion to suppress evidence and, over the objection of Petitioner, received in evidence the weapon found by Patrolman Wright, aforesaid.

From the judgment of guilty as charged rendered by the Trial Court and the overruling of Petitioner's motion for new trial, appeal was taken to the First District Court of Appeals, Hamilton County, Ohio, which Court affirmed the judgment of the Trial Court and found that the record discloses no error prejudicial to the rights of Petitioner.

From that affirmance, Petitioner filed his motion for leave to appeal to the Supreme Court of Ohio and an appeal as of right, in that a substantial constitutional question existed. The Constitutional question has been present throughout the Trial and all stages of the appeal. The appeal was allowed and the Supreme Court of Ohio, in a written opinion, affirmed the judgment of conviction.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Ohio is squarely in conflict with this Court's decision in *Beck, Petitioner* v. *State of Ohio,* 379 U.S. 89.

The standards of probable cause are constitutionally fixed and so sufficiently determined judicially that, without hesitation it may be said:

1. Probable cause is more than suspicion and less than the quanta of evidence necessary to sustain a conviction. (*Draper* v. *U. S.,* 358 U.S. 307 and *State* v. *Stotts,* 8 Ohio App. 2d 97)

2. Probable cause is a *reasonable* ground for *belief of guilt* and

> "this means less than evidence which would justify condemnation or conviction: probable cause exists when the facts and circumstances within the knowledge of the officer making the arrest or search, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."
>
> (*Brinegar* v. *U. S.*, 338 U.S. 160 and *State* v. *Rogers*, 94 Ohio Law Abs. 110, at page 115)

3. Probable cause must *precede* a lawful arrest for a felony and *precede* a search incidental to and contemporaneous with a lawful arrest. (*Carroll* v. *U. S.*, 267 U.S. 132 and *Carter* v. *U. S.*, 317 F.2d 386)

4. Even where probable cause to arrest and probable cause to search is established, the constitutional mandate is *that the arrest must also be lawful* — An arrest authorized and recognized by state arrest statutes. (*Staples* v. *U. S.*, 320 F.2d 817)

It is completely clear that *Section 2935.04* Revised Code of Ohio, authorized and permits an arrest without a warrant for a *FELONY* only and does not pertain to or concern misdemeanors. In *Dixon* v. *Maxwell*, 177 Ohio St. 20, at page 21, the Ohio Supreme Court said:

> "It is not necessary that an officer know that a specific crime has been committed in order for him to have probable cause to make an arrest. It is sufficient if he has reasonable grounds to believe from the circumstances that a *felony* has been committed and *that the accused has committed it.*" (Emphasis added)

Ohio Revised Code, *Section 2935.03*, which governs arrests for misdemeanors, specifically provides that the arrest is lawful only if:

1. A warrant has been obtained.
2. The misdemeanor is committed in the officer's presence.

In the instant case neither Officer Miller nor Officer Wright knew or could or did testify that he had reasonable, probable cause to believe a felony had been committed by this petitioner.

(Record, page 33 — Direct Examination of Patrolman Miller.)

"THE COURT: Sustained. Let me ask this: What felony did you have a belief had been committed, Officer?

"THE WITNESS: Well, the message, as I recall—

"THE COURT: You say you had a belief. What was your belief as to what felony?

"THE WITNESS: Well, he was wanted by the Loveland Police Department.

"THE COURT: For what?

"THE WITNESS: *I didn't know what he was wanted for,* but I knew that a warrant was obtained."

While this officer knew of the existence of a warrant, he did not have possession of it nor was it directed to the police unit of which he was a member.

Their only information was a brief radio broadcast concerning a person with a shotgun, sought by Loveland, Ohio Police. Possession of a shotgun is no crime and no shotgun was ever found by either officer. Neither officer knew this petitioner; neither had any prior contact with him or information about him; neither officer went to the Trailer Park in Loveland, Ohio, where a citizen had a complaint,

nor, prior to the arrest, spoke with a Loveland, Ohio Police Officer about a disturbance; and neither ever observed petitioner violate any law. Most significantly and strangely no charge was filed or prosecution commenced for any felony allegedly committed at a Loveland Ohio Trailer Park. Finally, neither officer knew or could state for *what crime,* felony or misdemeanor, they were arresting petitioner, particularly Officer Miller, who made and completed the arrest "because this man was wanted by the Loveland Police" — "on the authority of a radio message." (*Record, Page 31.*)

It is respectfully submitted that a man-wanted-police-radio message, *in and of itself* cannot constitute probable cause. A mere awareness of the vast number of false police reports demands the conclusion that while the Police Radio Announcer correctly and honestly floods the airwaves with reports he receives, his sources of information are not immediately verified, are often inaccurate, and, all too frequently are totally false. The Announcer is trustworthy — the report he receives is not. Not until and unless the radio bulletin is reasonably verified and proof of such verification is available and offered can it be logically contended that the "man wanted" broadcast is sufficient to constitute "a reasonable ground for belief of guilt." In this vein the words of Mr. Justice Stewart in *Beck* v. *Ohio,* 379 U.S. 89, ring clear:

> "good faith on the part of the officer is not sufficient to show probable cause."

The instant cause forcefully demonstrates that probable cause to believe a felony had been or was being committed did not exist and that, therefore, the arrest was unlawful.

The search of a vehicle as an incident to a lawful arrest is an area into which our Courts have not hesitated to tread.

By actual count petitioner finds thirty-six (36) federal decisions concerned with this subject from 1949 (*Brinegar* v. *U. S.*, 338 U.S. 160 and *U. S.* v. *O'Brien*, 174 Fed. 2d 341) to *Preston* v. *U. S.*, 376 U.S. 364, which was announced in 1964. Nor has Ohio been silent in this section of the criminal law. (*State* v. *Bernius*, 177 Ohio St. 155; *State* v. *Thompson*, 1 Ohio App. 2d 533 and *State* v. *Call*, 8 Ohio App. 2d 877. The principles gleaned from these pronouncements which could be properly discussed when considering the facts at hand may be summarized thusly:

A vehicle may be lawfully searched incidental to a lawful arrest made therein if—

a. A search appears reasonably necessary to protect the officer;

b. A search appears reasonably necessary to prevent escape;

c. A search appears reasonably necessary to prevent the secreting and/or destruction of evidence or contraband;

d. The officer reasonably believes that the vehicle is being used in the commission of a crime.

And it appears that so long as the arrest is lawful under state arrest statutes, whether it be for a felony or a misdemeanor, the incidental search is lawful. Yet, casual scrutiny of the facts, heretofore noted herein, convinces that not one of such rules prompted the search by Officer Wright of petitioner's vehicle. No valid legal reason can be found for the entrance into petitioner's car: and what was found therein cannot be considered for:

> "a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."
>
> *U. S.* v. *DiRe*, 332 U.S. 581

CONCLUSION

The ultimate result of the arrest, search, trial and conviction of petitioner makes a close look at the constitutional questions involved of compelling importance. The gross illegality of petitioner's arrest and the search of his vehicle not by the arresting officer and not as an incident to a valid arrest urge that the Petitioner for a Writ of Certiorari be granted.

Respectfully submitted,

BERNARD J. GILDAY, JR.
Attorney for Petitioner
1500 American Building
Cincinnati, Ohio 45202

APPENDIX A

Here is set forth the opinion rendered in the Supreme Court of the State of Ohio.

THE STATE OF OHIO, APPELLEE, *v.* FULTZ, APPELLANT.

[Cite as State v. Fultz, 13 Ohio St. 2d 79.]

Arrest without warrant—Probable cause—What constitutes—Information received by officer over police radio.

1. To have probable cause to arrest without a warrant an officer must have sufficient information from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. (Section 2935.04, Revised Code, construed and applied.)
2. Where a police officer has received information over the police radio and that information is such as to give the officer reasonable grounds to believe a felony has been committed, such officer has probable cause to make an arrest.

(No. 41004—Decided February 28, 1968.)

APPEAL from the Court of Appeals for Hamilton County.

On April 30, 1966, the chief of police of Loveland, Ohio, was summoned to a trailer park in that city. There he met one Dolly Meece who accompanied him to Lockland where she signed an affidavit charging George H. Fultz, appellant herein, with assault and battery, a misdemeanor. A warrant was issued for his arrest.

A call was put out on the police radio for the apprehension of Fultz. From the testimony at the trial it appears that the radio message contained the information

that a warrant had been issued for the arrest of Fultz; that he was armed; and that he had assaulted some people with a gun.

Within a short time a state highway patrolman who had heard the radio message stopped Fultz in his car at the intersection of Loveland-Madeira Road and Branch Hill Pike. A second patrolman arrived shortly thereafter and conducted a search of Fultz's car. He found a gun under the front seat.

Subsequently, Fultz was indicted for and found guilty of the crime of carrying a concealed weapon. The judgment of conviction was affirmed by the Court of Appeals and the cause is now before this court following allowance of a motion for leave to appeal.

Mr. Melvin G. Rueger, prosecuting attorney, and *Mr. Leonard Kirschner,* for appellee.

Messrs. Morr & Gilday and *Mr. Bernard J. Gilday, Jr.,* for appellant.

MATTHIAS, J. The primary question raised by this appeal is whether an arresting officer may base his belief that a felony has been committed on information received by him from a broadcast over the police radio. It is the appellant's position that such a source of information is not reliable enough to furnish the officer with probable cause to make the arrest.

In disposing of this question it is well to consider the realities of crime and law enforcement in present-day society. To effectively combat crime today, the concerted effort of local, state and federal officers, with their vast network of radio and teletype communication systems, is required. The present-day criminal is a mobile criminal. Because of his use of the motor vehicle and other means of rapid transportation even a slight delay in his apprehension will give him an opportunity to be far removed from

the scene of the crime and the person or persons he has injured or exploited. The criminal-at-large is a threat to society; thus, it is the duty of the police to apprehend him at the earliest opportunity not only because of the crime committed but to prevent further depredations by him.

Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by the modern-day criminal. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information.

A police officer necessarily relies on the information he receives over the police radio, and upon the receipt of such information it is the duty of the officer to act and act quicky. And, where the information is such as to give the officer reasonable grounds to believe a felony has been committed, then he has probable cause to make an arrest.

In the instant case, the arresting officer was a state highway patrolman. Section 5503.02, Revised Code, provides in part:

"* * * The superintendent of the state highway patrol or any patrolman may arrest without a warrant any person, who is the driver of or a passenger in any vehicle operated or standing on a state highway, who he has reasonable cause to believe is guilty of a felony, under the

same circumstances and with the same power that any peace officer may make such arrest. * * *"

Furthermore, Section 2935.04, Revised Code, reads as follows:

"When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, *any person without a warrant* may arrest another whom he has *reasonable cause to believe* is guilty of the offense, and detain him until a warrant can be obtained." (Emphasis added.) It is worth noting that, under the terms of this statute, even a private citizen may make an arrest upon reasonably reliable information that a felony has been committed.

For an arrest without a warrant to be constitutionally valid the arresting officer must have probable cause to make it at that time. To have probable cause the officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. *Brinegar* v. *United States,* 338 U.S. 160; *Henry* v. *United States,* 361 U.S. 98, 102; and *Beck* v. *Ohio,* 379 U.S. 89.

The officer in the instant case testified that at the time of the arrest he believed that a felony had been committed by the appellant. The question is: Did he have reasonable ground for such belief? This is a question of fact and is dependent upon the information the officer received from the police radio message.

Unfortunately, the record does not contain a complete statement of what went out over the police radio. However, from the testimony in the record, it is clear that the officer learned from the police radio that appellant had assaulted persons in a trailer court with a gun (a felony under Section 2901.241, Revised Code); that he was

armed; and that a warrant had been issued for his arrest. Certainly, with such information in his possession the officer had probable cause to make the arrest. The arrest, therefore, was valid.

Appellant has also questioned the validity of the search of his car which produced the weapon upon which the present conviction for carrying a concealed weapon is based. The officer had been informed that appellant was armed, and the search, made by a second officer arriving a few minutes later, was conducted as an incident of the arrest. It is now well settled that a search of a motor vehicle incident to a valid arrest is a valid search. *Brinegar* v. *United States, supra* (338 U.S. 160). See *Dixon* v. *Maxwell,* 177 Ohio St. 20; *Draper* v. *United States,* 358 U.S. 307; *Harris* v. *United States,* 331 U.S. 145; and *United States* v. *Rabinowitz,* 339 U.S. 56.

Having determined that the arrest in the present case was valid, we conclude that the search was also valid.

There being no error prejudicial to appellant, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, O'NEILL, HERBERT and BROWN, JJ., concur.